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In The
Supreme Court Of The United States

OCTOBER TERM, 1983

WILLIAM H. STEPNEY, JR.,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

CARL SCHUMAN
Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373
Counsel for Respondent

QUESTIONS PRESENTED

1. Should this Court review a claim not pressed or passed upon below that the introduction of evidence concerning the invocation of the petitioner's constitutional rights while providing a noncustodial statement to the police violates his privilege against self-incrimination?
2. Should this Court review a claim, never heretofore seasonably identified as a federal question, that a state trial court unfairly commented on the credibility of the petitioner's principal alibi witness?
3. Should this court review a claim, never heretofore seasonably identified as a federal question, that a state trial court may not instruct the jury that

they may consider the defendant's interest in the outcome of the case?

4. If questions 3 and 4 standing alone do not merit this Court's review, should this Court review this case based on the contention that the alleged errors raised in those questions, when combined, denied the petitioner due process?

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RULE INVOLVED

Rule 17.1
Revised Rules of the Supreme Court of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed

from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

As its statement of the case, the state adopts, with only the minor modification made at the end, the following excerpt from the opinion of the Connecticut Supreme Court:

> On May 9, 1979, at approximately 3:45 p.m., the body of Mrs. Barbara McKitis was discovered in the bedroom of her home in Bantam. The victim had been severely beaten with a blunt object, possibly a blood-stained brick found near the body. There were five "chop" wounds on her skull, consistent with the use of an axe or hatchet. Multiple stab wounds and slash wounds were found on her head, neck, and legs. One of the stab wounds in her neck had severed the vertebral artery. There was a penetration wound to the victim's genitalia, which had been made before death.
>
> The body was lying on its left side on the floor of the bedroom near the bed. The victim's dungarees were pulled down around the ankles and her panties were around her knees. Blood was spattered on the bed, the carpet, the walls, and on other objects throughout the bedroom, which was in extreme disarray. A butcher knife was found under the body and an eight ounce Budweiser beer can was lying approximately eighteen inches away. The medical examiner estimated that

death had occurred "closer to the morning hours than to the afternoon."

The defendant had met the victim on May 3, 1979, six days before the murder, in connection with an on-going tag sale of furniture and household goods she was holding following a separation from her husband. The defendant returned to the victim's house with his wife and daughter on May 5 and May 7 to buy a few items. He also arranged to help her clear some scrap metal out of her garage to sell to a junk dealer. On May 8, the defendant spent most of the day at the victim's house, during which time he filled his truck with scrap metal. He drove the fully loaded truck to his home in Morris that evening. Early the next day, the day of the murder, the defendant drove the truckload of scrap metal to a junkyard in Waterbury, returning home between 9:30 and 10 a.m. When the defendant told his wife that he was going to the victim's house to split the money from the sale of the scrap with her and to pick up another load, Mrs. Stepney became annoyed and a quarrel ensued. The defendant left home in his truck some time after 10 a.m. Between 10 and 10:30 a.m., he bought an eight pack of eight ounce Budweiser beer in Morris, and between 10 and 11 a.m. he bought another eight pack in Bantam. His truck was seen parked in the victim's backyard sometime between 10:30 and 11 a.m. The defendant's truck left the victim's house between 11:15 and 11:30 a.m. and arrived at the defendant's house between 11:45 a.m. and noon.

> The defendant's own testimony was that he arrived in his truck at the victim's house on May 9, the day of the murder, at about 10:45 a.m. He drank one of the eight ounce cans of beer and gave another to the victim. He stated that he and the victim talked together for thirty minutes or so, and that he mixed the victim a highball during that time. He arrived back at this own home at about noon.
>
> The victim's blood was type AB, Rh negative. The defendant's blood was type B, Rh positive. Bloodstains which tested as AB negative were discovered on the inside of a pair of green workpants seized from the defendant, on the sole of a canvas shoe belonging to the defendant, and on the steering wheel of the defendant's truck.

Petition at 3A-5A. On the basis of this evidence the jury found the petitioner guilty of murder. The trial judge imposed a prison sentence of twenty-two years to life. State Appellate Record [hereinafter R] at 13. The defendant appealed to the Connecticut Supreme Court, which unanimously affirmed his conviction.

REASONS FOR THE DENIAL OF THE WRIT

I. THE PETITIONER'S FIRST CLAIM WAS NOT PRESSED OR PASSED UPON BELOW AND IS INSUBSTANTIAL ON THE MERITS

A. The Claim Was Not Pressed or Passed Upon Below

The petitioner first seeks a writ of certiorari on the ground that the introduction at trial of his noncustodial statement to the police that he wanted to stop answering questions and consult with an attorney as well as the introduction of evidence of his demeanor at the time violated his privilege against self-incrimination. This court should decline review because this claim was not "pressed or passed upon below." Illinois v. Gates, 103 S.Ct. 2317, 2321-22 (1983).

At the conclusion of his objection at trial to the introduction of the challenged evidence the defendant told the trial judge that he was "dealing here with a pure

evidentiary question and the rules of court and not any constitutional claim." Trial Transcript [hereinafter TT] at 1237. Thus not only did the petitioner fail to raise the constitutional issue in the trial court but he expressly urged the trial court not to consider it. The petitioner, in fact, admits to this Court that the basis of his objection at trial was the state law claim that the trial court should have excluded his statements on the ground that "they were hearsay, exculpatory, and not inconsistent with his plea of not guilty." Petition at 32 n.3. See also id. at 31 n.2 ("[Petitioner's] claim at the trial was merely an evidentiary claim as to the admissibility of his statement."); id. at 34 ("Petitioner objected at the trial court level, in his appeal brief (p. 56-57), in oral argument to the Connecticut Supreme Court, and in his motion to reargue, that the invocation of a constitutional right could in no way be

deemed to be an admission by the petitioner and therefore admissible as an exception to the hearsay rule.").

The petitioner nevertheless makes the brash and untoward allegation that "[t]he petitioner's objection to the invocation of his constitutional right to remain silent and for consultation with an attorney does not even appear in the Connecticut Supreme Court opinion since the court chose to ignore the claim altogether and focus entirely upon the issue of admissions." Petition at 34 n.4. Of course the fact that the state supreme court did not pass upon the constitutional issue in itself militates against review by this Court. Illinois v. Gates, supra. But more important than the fact the court below did not address the issue are the reasons for this fact. Obviously one of the reasons that the court "chose to ignore the claim altogether" was that the petitioner chose to ignore the

claim altogether in the trial court and state contemporaneous objection rules provide that state appellate courts will ordinarily not consider such claims. See State v. Evans, 165 Conn. 61, 69, 327 A.2d 576 (1973). The petitioner, moreover, all but chose to ignore the claim in his state supreme court brief. The petitioner devoted only three generally parenthetical paragraphs of his sixty-one page state appellate brief to the constitutional issue, and instead of distinctly identifying the constitutional question in his statement of issues merely reiterated there the same issue raised in the trial court: "Whether the trial court erred in failing to sustain the defendant's objections to the testimony of two Connecticut State Police Officers as to statements made by the defendant which defendant claimed were inadmissible hearsay? Petitioner's State Supreme Court Brief at 2, 56-57 (emphasis added). Thus the Connecti-

cut Supreme Court may quite understandably have never discovered the issue, or, having discovered it, may, in view of its own case law, have considered it improperly briefed and on that ground declined to address it. See New Haven Savings Bank v. Valley Investors, 174 Conn. 77, 84, 382 A.2d 321 (1977) (issue party introduced as "an afterthought in a terse statement in his brief" is inappropriate for review). Whether the explanation was state contemporaneous objection rules or state supreme court policy against reviewing claims improperly briefed, the Connecticut Supreme Court's decision not to entertain the petitioner's constitutional issue rests on independent and adequate state grounds which preclude further review by this Court. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978).

The petitioner attempts to circumvent these jurisdictional barriers by asserting

that notwithstanding his failure to raise the constitutional issue in the trial court "the holding of the Connecticut Supreme Court raises the issue to one of constitutional dimension." Petition at 31 n.2. Such gamesmanship is unavailing. The "not pressed or passed upon" doctrine would rapidly become meaningless if a petitioner could avoid it merely by saying that a holding of a state appellate court which in all respects and for quite valid reasons addresses only a state law question in effect also violates his constitutional rights. The petitioner at most has a constitutional right to fair appellate consideration of his state law claim. He has no constitutional right to an accurate resolution of it. The "not pressed or passed upon" doctrine therefore precludes further consideration of the petitioner's first issue.

B. Alternatively, The Issue Is Insubstantial On the Merits

In the unlikely event that this Court were to find no jurisdictional barriers to reviewing the petitioner's first issue, it should decline review on the ground that the issue is insubstantial on the merits. Petitioner admits that at the time he asked for a lawyer and indicated his desire to stop talking he was not in police custody and was in fact free to leave at any time. Petition at 32 n.3, 38. That being true, the case fits rather comfortably into the rationale of Jenkins v. Anderson, 447 U.S. 231 (1980), in which this Court held that the government may impeach a defendant through the use of his prearrest silence. Although in the present case the state used the invocation of the defendant's rights substantively rather than for impeachment, in neither case does the introduction of such evidence violate a person's privilege

against compelled self-incrimination. As the Jenkins Court held, only when governmental action, such as the making of an arrest, functions as an "inducement" for the accused to invoke his fifth amendment privilege does the introduction of evidence concerning that invocation infringe on the privilege. See also Fletcher v. Weir, 455 U.S. 603 (1982) (protections of the privilege attach only after suspect is in custody and police issue Miranda warnings). For this reason the lower federal courts have condemned the substantive use of statements revealing an invocation of constitutional rights made after arrest, see United States v. McDonald, 620 F.2d 559, 560-64 (5th Cir. 1980); United States v. Williams, 556 F.2d 65 (D.C. Cir.), cert. denied, 431 U.S. 972 (1977); United States v. Faulkenberry, 472 F.2d 879, 881-82 (9th Cir.), cert. denied, 411 U.S. 970 (1973), but, as far as can be ascertained, have never prohibited the use of such

statements when made prior to arrest. In this case, then, because the petitioner's decision to stop answering police questions was voluntary rather than compelled or induced by governmental arrest, the introduction of evidence of this decision did not violate his privilege against compelled self-incrimination. See generally Andreson v. Maryland, 427 U.S. 463 (1976) (privilege not violated by search warrant because no complusion).

II. THE PETITIONER'S SECOND CLAIM WAS NEVER HERETOFORE IDENTIFIED AS A FEDERAL QUESTION AND IS INSUBSTANTIAL ON THE MERITS

A. The Claim Was Never Heretofore Identified As a Federal Question

The petitioner also seeks a writ of certiorari on the ground that the trial court's instructions on the inconsistent statements of his wife, who was his chief alibi witness, "unfairly focused on [her] to the exclusion of all other witnesses,

invaded the province of the jury, and destroyed the perfect impartiality of the court, all in violation of petitioner's fourteenth amendment rights." Petition at 39 (capitalization deleted).[1] The petitioner presents no evidence, nor can he present any, to show that he ever properly identified this issue as a federal question in the courts below. Indeed, the Connecticut Supreme Court observed that "the defendant never makes clear the grounds, constitutional or otherwise, upon which error [in the instructions] should be found. Petition at

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1 The court instructed as follows:

> It is the province of the jury to determine the credibility, if any, to be giver the testimony of a witness who has been impeached. Evidence was offered in this case, as I remember it and, of course, this is for you to recall. Your recollection is controlling. I think there was evidence of statements, for example, by Mrs. Stepney which you may believe to have been inconsistent with her testimony. You heard the evidence and you heard her explanation as to some of it, anyway.

T.T. at 2206.

14A-15A. Only in response to this observation did the petitioner belatedly allege in his motion to reargue in the state supreme court that the jury charge violated his rights "under the Sixth and Fourteenth Amendments to the United States Constitution and Article First Section Eight of the Connecticut Constitution." Motion to Reargue at 1-2. Given that claims of invalid jury instructions may present state law as well as federal questions, see Anderson v. Harless, 103 S.Ct. 276 (1982), and that proper presentation of the federal question forms a prerequisite to this Court's jurisdiction, see Illinois v. Gates, supra; Tacon v. Arizona, 410 U.S. 351, 353 (1973), this Court should decline further consideration of the petitioner's newly raised federal question regarding jury instructions.

B. The Claim Is Insubstantial On the Merits

The petitioner points to no provision of the Considerations Governing Review on Certiorari that could even conceivably justify an allocation of this Court's scarce time to a reconsideration of whether a state trial court fairly characterized the testimony of his principal alibi witness. See Rule 17.1, Revised Rules of the Supreme Court of the United States. This Court has made it clear enough that it does not "grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925) (Holmes, J.). Into the very face of this admonition the petitioner's claim would have this Court wade through some 2,000 pages of transcript to determine whether other witnesses had testified as inconsistently as Mrs. Stepney, Petition at 45, whether Mrs. Stepney had sufficiently explained her inconsistencies,

Petition at 48, and whether the court's instructions had singled her out "to the exclusion of all of the [sic] witnesses . . . ." Id. It should be manifest that the fact-laden question here is of no interest to anyone other than the immediate parties involved and would, if resolved by this Court, have minimal or no precedential value for the legal system as a whole. Certiorari is entirely inappropriate under these circumstances.

Finally, without belaboring the merits, it should suffice to note that the Connecticut Supreme Court's resolution of the question is beyond reproach. This Court has long held that a trial judge may make fair comment on the evidence. See, e.g., Quercia v. United States, 289 U.S. 466, 469-70 (1932). The Connecticut Supreme Court found that the trial court's illustrative comment concerning contradictions in Mrs. Stepney's testimony was "certainly

'fair comment' on her testimony" because "[h]er cross-examination revealed numerous contradictions between her trial testimony and prior statements at the suppression hearing or to the police concerning the defendant's actions on the day of the murder." Petition at 16A. Such a factual finding is for conclusive determination by the state courts and is not open for reconsideration here. Wolfe v. North Carolina, 364 U.S. 177, 196 (1960).

III. THE PETITIONER'S THIRD CLAIM WAS NEVER HERETOFORE IDENTIFIED AS A FEDERAL QUESTION AND IS INSUBSTANTIAL ON THE MERITS

The petitioner's third proposed basis for the granting of certiorari is the fact that the trial judge made a fleeting reference to the undeniable truth that the defendant had an interest in the verdict.[2]

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[2] The court instructed as follows:

In this case, the accused took the witness stand. He had a right to do so, and in (cont.)

Here again the petitioner never seasonably identified this claim as a federal question in the courts below. See Brief in Opp. supra pp. 12-14. On the merits, moreover, the claim is wholly without substance. The petitioner relies in the first instance on four decisions of this Court which he contends contradict the ruling in the court below. Petition at 32, 52-53. These decisions, however, are perfectly consistent with the challenged ruling. In two of them what prompted reversal was not just a reference to the defendant's interest in the outcome but rather a suggestion or characterization of the defendant's testimony or

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2(cont.) weighing the testimony of an accused person you should apply the same principles by which the testimony of other witnesses is tested. An accused person, having taken the witness stand, stands before you just like any other witness and is entitled to the same consideration and must have his testimony weighed in the same way as any other witness, including his interest in the verdict which you are about to render.

T.T. at 2211.

of all defendants' testimony as being fabricated. Quercia v. United States, 289 U.S. 466, 468-69 (1932);[3] Allison v. United States, 160 U.S. 203, 208-09 (1895).[4] In a

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[3] "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty."

[4] It must be shown by the evidence that the party who was slain was at the time doing something that would satisfy a reasonable man, situated as was the defendant, that the deceased, William Allison, then and there was about to do that which would destroy the life of the defendant, and that he could not prevent it except by doing as he did do. The question as to whether that is the state of case or not is a question that is to be finally passed upon by the juries of the country, and by you in this case, and you must have something more tangible, more real, more certain, than that which is a simple declaration of the party who slays, made in your presence by him as a witness when he is confronted with a charge of murder. All men would say that. No man created would say otherwise when confronted by such circumstances, and the juries, as a matter of fact, would have nothing to do but to record the finding which was willed or established by the declaration of the party who did the killing."

(emphasis deleted).

third case this Court noted only that "[t]he trial judge did not charge the jury to treat the testimony of defendant in a manner different from that in which they treated the testimony of other witnesses . . .," Wilson v. United States, 162 U.S. 613, 621 (1896), something equally true here. See Brief in Opposition note 2 supra. Finally, in Hicks v. United States, 150 U.S. 442, 450-52 (1893), this Court expressed concern over an instruction which in some detail had referred to the defendant's interest in the outcome[5] but concluded that "[i]f this were the only objectionable language contained in

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5 "You are to consider his interest in this case; you are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case, the largest, perhaps, we could have under any circumstances in life, and such an interest, consequently, as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire. Therefore it is but right, and it is your duty to view the statements of such a witness in the light of his attitude and in the light of other evidence."

the charge, we might hesitate in saying that it amounted to reversible error." Id. at 452.

Whatever doubt Hicks had left as to the validity of an interest in the outcome instruction was resolved decisively one year later in Reagan v. United States, 157 U.S. 301, 304-11 (1894), a case the petitioner elects not to cite. In Reagan this Court unanimously upheld an instruction which like the one at issue here informed the jury that "[t]he deep personal interest which [the defendant] may have in the result of the suit should be considered by the jury in weighing his evidence . . . ." Id. at 304. This Court's stamp of approval stemmed from the basic reality that "the interest of the defendant in the result of the trial is of a character possessed by no other witness . . . ." Id. at 310.

No subsequent opinion of this Court has ever questioned the correctness of the

Reagan decision. Nor is there any significant division of opinion among the lower federal courts. Of the eight Circuits that have considered the matter six have unequivocally approved the use of an instruction informing the jury that they may consider the defendant's interest in the outcome. See United States v. Figurski, 545 F.2d 389, 392 (4th Cir. 1976); United States v. Wiggins, 566 F.2d 944, 945 (5th Cir.), cert. denied, 436 U.S. 950 (1978); United States v. Ambrose, 483 F.2d 742, 753 (6th Cir. 1973); United States v. Wright, 542 F.2d 975, 985 (7th Cir. 1976), cert. denied, 429 U.S. 1073 (1977); Louie v. United States, 426 F.2d 1398, 1402 (9th Cir.), cert. denied, 400 U.S. 918 (1970); United States v. Hill, 470 F.2d 361, 363-65 (D.C. Cir. 1972). In the remaining two Circuits the courts have criticized the challenged instruction but have failed to find that its issuance constitutes reversible error. See

United States v. Schlesinger, 598 F.2d 722, 727 (2d Cir.), cert. denied, 444 U.S. 880 (1979); United States v. Standing Bear, 538 F.2d 196, 204 (8th Cir.), cert. denied, 429 U.S. 1025 (1976). And while a handful of states have found such an instruction prejudicial, see Petition at 55-56, such a division among the states illustrates only a disagreement on a matter of public policy and not, in light of Reagan, a matter of constitutional law. This Court long ago closed the door on the question at bar, see Reagan v. United States, supra, and it should not now be reopened.

IV. THE ISSUE OF WHETHER THE ALLEGED ERRORS RAISED BY QUESTIONS 3 AND 4, WHEN COMBINED, DENIED PETITIONER DUE PROCESS IS NOT A PROPER BASIS FOR THE GRANTING OF THE WRIT OF CERTIORARI

The petitioner's final argument is that the whole exceeds the sum of its parts and that even if Questions 3 and 4 standing alone do no merit this Court's review then

when combined they do so. The short answer to such an argument is that "[t]his is not the supreme court of review for every case decided 'unjustly' by every court in the country." Rogers v. Missouri Pacific Railroad, 352 U.S. 518, 541 (1957) (Frankfurter, J., dissenting). Accord Maggio v. Tulford, 103 S.Ct. 2261, 2266 (1983) (Marshall, J., dissenting, quoting Vinson, C.J.). Whether the cumulative impact of the alleged errors in Questions 3 and 4 deprived the petitioner of a fair trial is a matter for too fact-laden and idiosynchratic to have any precedential value for the legal system as a whole or in any other way to justify the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

STATE OF CONNECTICUT
Respondent

By: ANNE C. DRANGINIS
Assistant State's Attorney
Judicial District of
Litchfield

/s/ CARL SCHUMAN
CARL SCHUMAN
Assistant State's Attorney
Appellate Unit
Office of the Chief State's
Attorney

A. Jeffrey Somers
Legal Intern
Office of the Chief State's
Attorney

I hereby certify that three copies of this brief have been mailed by February 15, 1984 to James A. Wade and Sally S. King, Robinson, Robinson & Cole, 799 Main Street, Hartford, CT. 06103.

/s/ CARL SCHUMAN
CARL SCHUMAN
Assistant State's Attorney